

9-4-2013

## McAmis v. State Respondent's Brief Dckt. 39420

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY SCOTT MCAMIS,	)	
	)	No. 39420
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2010-10042
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON

HONORABLE JAMES C. MORFITT  
District Judge

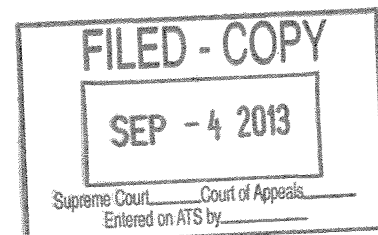
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## STATEMENT OF THE CASE

### Nature of the Case

Gregory Scott McAmis appeals from the summary dismissal of his petition for post-conviction relief.

### Statement of the Facts and Course of the Proceedings

McAmis filed a petition for post-conviction relief challenging his conviction for grand theft. (R., pp. 3-6.) In his petition McAmis asserted the prosecution breached the plea agreement by failing to make the agreed-upon sentencing recommendation and his counsel was ineffective for failing to object. (R., pp. 4-5.) The district court appointed counsel to represent McAmis. (R., pp. 23-24, 42.)

The state answered the petition, and moved for summary dismissal. (R., pp. 26-30.) The court likewise filed a notice of intent to summarily dismiss the petition. (R., pp. 44-55.) The bases for the district court's notice included that the record in the underlying criminal case showed that McAmis absconded to Florida after entering his plea but before sentencing, and had thereby breached the plea agreement and relieved the prosecution of its obligation to make the agreed-upon sentencing recommendations. (R., pp. 45-54.) The district court subsequently dismissed the petition on the bases stated in the notice of intent to dismiss. (R., pp. 68-70.) McAmis filed a notice of appeal timely from the order of dismissal. (R., pp. 72-73.)

### ISSUE

McAmis has failed to state an issue on appeal. (See generally Appellant's brief.) The state submits the issue as:

Has McAmis failed to show error in the summary dismissal of his post-conviction petition because the facts underlying his claims are disproved by the underlying record?

## ARGUMENT

### McAmis Has Failed To Show Error In The Summary Dismissal Of His Post-Conviction Petition Because The Facts Underlying His Claims Are Disproved By The Underlying Record

#### A. Introduction

The district court concluded that the underlying criminal record showed that McAmis absconded to Florida after entering his plea but before sentencing, and thus relieved the state of its duties under the plea agreement. (R., pp. 45-54.) Thus, McAmis's post-conviction claims, based on the factual allegation that the prosecutor breached the plea agreement, were disproved by the record of the underlying criminal case. (Id.) McAmis argues on appeal that he was entitled to a hearing in the criminal case on whether he breached the plea agreement. (Appellant's brief, p. 3.) Even if his counsel could have secured such a hearing for him, however, McAmis has presented no evidentiary or legal basis under which he could have prevailed at such a hearing. He has therefore failed to show ineffective assistance of counsel.

#### B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The Court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669. However, the Court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the

applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. McAmis Failed To Present Any Evidence Showing He Could Have Prevailed On A Claim That The Prosecutor Breached The Plea Agreement

"To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Workman, 144 Idaho at 522, 164 P.3d at 802.

In order to establish a prima facie claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). When a defendant claims his counsel was ineffective for failing to file a motion, "the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent



performance.” Wolf v. State, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011) (citing Boman v. State, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App.1996)). “Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test.” Id. at 67-68, 266 P.3d at 1172-73.

Absconding to avoid sentencing is a breach of the plea agreement by the defendant, excusing the state from making the recommendations otherwise required by the plea agreement. State v. Jafek, 141 Idaho 71, 74, 106 P.3d 397, 400 (2005). The record in the underlying criminal case shows McAmis absconded prior to sentencing. (R., pp. 45-47.) Thus, his breach of the plea agreement excused the state from making the recommendations otherwise required by the agreement. (R., pp. 51-52.) Claims based on the underlying assertion that the state breached the plea agreement were therefore disproved by the record of the underlying criminal case. (R., pp. 52-54.) The district court properly held that McAmis’s petition did not state a claim of ineffective assistance of counsel for failing to claim the state breached the plea agreement because the underlying record disproves the claim there was a breach.

On appeal McAmis acknowledges he “failed to appear for 90 days.” (Appellant’s brief, p. 2.) He asserts, however, that he should have had a hearing on whether the state was excused from its obligations under the plea agreement by virtue of his absconding. (Appellant’s brief, p. 3.) The record contains neither allegations nor evidence showing how McAmis could have prevailed at such a

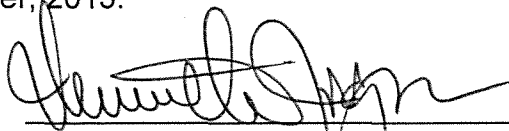
hearing. There was, therefore, no *prima facie* showing of either deficient performance or prejudice arising from trial counsel's failure to request a hearing at which McAmis could not have prevailed.

The underlying record shows that the prosecutor did not breach the plea agreement. Rather, he was excused from the obligation to make the recommendations stipulated by the agreement because McAmis absconded and thus breached the plea agreement. The district court correctly dismissed the petition because its claims were disproved by the record of the underlying criminal case.

#### CONCLUSION

The state respectfully requests this Court to affirm the summary dismissal of McAmis's petition for post-conviction relief.

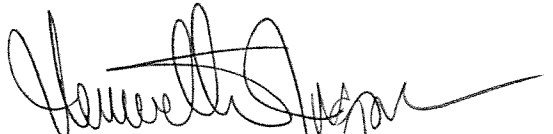
DATED this 4th day of September, 2013.

  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of September, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREGORY SCOTT MCAMIS  
IDOC #85328  
SICI COMMUNITY WORK CENTER  
P.O. Box 8509  
Boise ID 83707

  
KENNETH K. JORGENSEN  
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KKJ/km